DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. STEVEN CHARLES CARLSON, Appellant.	)	No. 1 CA-CR 08-0746 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-154611-001 DT

The Honorable Barbara L. Spencer, Judge *Pro Tempore*

CONVICTION AFFIRMED; SENTENCE AFFIRMED AS MODIFIED

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B R O W N, Judge

¶1 Steven Charles Carlson appeals his conviction and sentence for one count of manslaughter. For the following reasons, we affirm the conviction, but modify his sentence to reflect a proper calculation of presentence incarceration credit.

BACKGROUND

¶2 In August 2007, police officers were called to the scene of a shooting near a bar in Glendale, Arizona. Witnesses reported that the suspect had fled the scene, and the gunshot victim had revealed that "his brother" shot him. The paramedics transported the victim to the hospital and he died shortly thereafter.

¶3 Police officers later received a phone call from Carlson. He directed the police to the area where he had disposed of the rifle after the shooting, and the police were able to recover the rifle. Carlson admitted to police that he was involved in the shooting, but claimed that it was accidental. He told the police that the victim was a close friend who was like a brother to him. Carlson also stated that he had "about four beers" that evening and "he was buzzin'." At some point, the rifle that Carlson was holding "went off." Carlson said that he thought the magazine was not in the rifle at the time. He admitted, however, that he may have been "fooling around" with the rifle and he remembered holding the

rifle in his hand before the shooting. He also told police that, following the shooting, he left the victim at the scene after the victim told him to "get out of here." Carlson then threw the gun into a bush, drove home, and called police. He was subsequently indicted for one count of manslaughter, a class 2 dangerous felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1103 (2010).[1]

¶4 At trial, following the selection of the jury, Carlson made an oral motion *in limine* to preclude a witness, D.H.,[2] from testifying about a statement made by the victim to Carlson after the shooting. Defense counsel stated that D.H. would say something to the effect of: "Why do you always have to do stupid shit like this? You shot me." Carlson conceded that the second part of the statement ("You shot me") was admissible, but argued that the victim's question referred to "some unknown history of their relationship" or "to some unknown prior acts." The State argued that the statement was part of "a complete statement" made by the victim that fell within the dying declaration or excited utterance exceptions to the hearsay rule.

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[1] We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

[2] D.H. was in the parking area where the shooting occurred and immediately approached the victim and Carlson after hearing the noise from the gunshot.

Carlson countered that even if the statement was admissible under the exceptions referenced by the State, it would still "be referring to some prior acts that would not qualify under [Arizona Rule of Evidence] 404." The court considered the requirements for both the dying declaration and excited utterance exceptions and concluded the statement would "come in under [those] exceptions to the hearsay rule." The court also stated that counsel could re-urge the issue later if, based on testimony during the trial, there was "something different and it [should not] come in."

¶5 The jury found Carlson guilty of manslaughter, and the jury determined the offense to be dangerous. Carlson stipulated to the aggravating circumstance of leaving the scene of the crime. The trial court sentenced Carlson to nine and a half years in prison and granted him 362 days of presentence incarceration credit. Carlson timely appealed.

DISCUSSION

A. Admissibility of Victim's Statement

¶6 We review a trial court's admission of evidence for an abuse of discretion, and we will reverse only upon a finding of clear prejudice. *State v. Fischer*, 219 Ariz. 408, 416, ¶ 24, 199 P.3d 663, 671 (App. 2008). A trial court abuses its discretion when "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial

of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted).

¶7 Carlson argues that the trial court abused its discretion by admitting the victim's statement because it referred to prior bad acts. We disagree.

¶8 Evidence of a defendant's prior bad acts are not admissible to prove a person's propensity to commit the crime, but are admissible when used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b); *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 20, 984 P.2d 16, 23 (1999). Before a trial court may admit evidence of a defendant's prior bad acts, the court must find that "there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act." *State v. Anthony*, 218 Ariz. 439, 444, ¶ 33, 189 P.3d 366, 371 (2008) (citation omitted). The court must also find that: (1) the act is offered for a proper purpose; (2) the prior act is relevant to prove that purpose; and (3) the probative value of the act is not outweighed by the potential for unfair prejudice. *Id*. Further, upon request, the trial court must provide an appropriate limiting instruction. *Id*.

¶9 "Arizona has long recognized that testimony about prior bad acts does not necessarily provide grounds for

reversal." *State v. Jones*, 197 Ariz. 290, 305, ¶ 34, 4 P.3d 345, 360 (2000) (citations omitted). In *Jones*, our supreme court addressed the issue of whether a witness' testimony about prior involvement with the defendant constituted reversal of a defendant's convictions for murder, aggravated assault, robbery, and burglary. 197 Ariz. at 304, ¶¶ 30-34, 4 P.3d at 359. The witness testified that the defendant had asked him for duct tape for use in another robbery. *Id*. at 304, ¶ 31, 4 P.3d at 359. When asked why the witness did not return the defendant's phone calls, the witness stated that he knew the defendant was in jail and did not wish to call him there. *Id*. The court found that the statements were admissible because the testimony made only "relatively vague references to other unproven crimes and incarcerations," the statements were unsolicited descriptions concerning a dissimilar crime, and the court provided a limiting instruction. *Id*. at 305, ¶¶ 34-35, 4 P.3d at 360.

¶10 Similar to *Jones*, we find no reversible error here because the statement at issue cannot reasonably be construed as referring to a prior bad act. The phrase "stupid shit" does not point to any specific crime, wrong, or act that Carlson may have committed. If Carlson believed that the phrase did refer to a prior crime, wrong, or act covered by Rule 404(b), then it was his obligation to request that the court make a finding that the act was committed by clear and convincing evidence. *See*

Anthony, 218 Ariz. at 444, ¶ 33, 189 P.3d at 371 (the court must find by clear and convincing evidence that the defendant committed the prior bad act); *see also State v. Lopez,* 217 Ariz. 433, 435, ¶ 4, 175 P.3d 682, 684 (App. 2008) (defendant's failure to properly object to an alleged error at trial forfeits defendant's right to relief absent fundamental error). Carlson did not object on that basis at trial. Even if he had, the court could not have made such a finding because the reference to "stupid shit" is so vague that it cannot be measured against any objective standard. In fact, Carlson concedes that the statement refers to an "unspecified" act. Therefore, because the statement did not reference any specific information about any prior instance or act, the statement is simply too vague to constitute a prior bad act within the context of Rule 404(b). *See Peyton v. Commmonwealth*, 253 S.W.3d 504, 517 (Ky. 2008) (finding that a detective's statement that he had dealt with the defendant on many different occasions was "vague and did not allude to any particular bad act [the defendant] committed" and, therefore, did not fall under Kentucky's Rule of Evidence 404(b)); *State v. Carbo*, 864 A.2d 344, 348 (N.H. 2004) (holding a mistrial was not warranted after the victim's father testified that "we suspected things were going on," "that other things more severe may have been going on" and "you can't . . . believe this man is guilty of something without proof[,]" because the

testimony "did not unambiguously reveal evidence of specific bad acts"); *State v. Trout*, 757 N.W.2d 556, 558, ¶ 10 (N.D. 2008) (concluding that a detective's testimony about "some other information" obtained by police and information that the detective called defendant's employer to "check up on another incident that occurred in his building" revealed no specific fact regarding a prior act and was "too vague to be unduly prejudicial" to the defendant).

¶11 Based on our conclusion, the trial court was not required to evaluate the proffered evidence under Rule 404(b). Instead, the trial court properly concluded that the statement at issue was admissible under two exceptions to the hearsay rule.

¶12 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). A dying declaration is a hearsay exception, applicable in homicide prosecutions, involving a statement made by a declarant, when the declarant believed death to be imminent, concerning the cause or circumstances of the declarant's impending death. *Id*. at 804(b)(2). An excited utterance, also an exception to the hearsay rule, is "[a] statement relating to a startling event or condition made while

the declarant was under the stress of excitement caused by the event or condition." *Id.* at 803(2).

¶13 At trial, D.H. testified that he and N.H., another witness, were smoking outside of a bar the night of the shooting. After they heard a loud bang, they walked approximately thirty feet toward a white pickup truck and found one person standing next to the truck and one person lying on the ground. D.H. asked Carlson about the noise, and he responded, "Yes, it was a gunshot, I shot him[.]" Carlson then offered to take the victim to the hospital. D.H. testified that he "saw a lot of blood" and heard the victim say "'I can't believe you always do stupid shit like this. I can't believe you shot me." D.H. and N.H. tried to persuade Carlson to stay, but he proclaimed "I have got to get out of here."

¶14 D.H. further testified that he called 9-1-1 to report the incident. Carlson got back into the truck and drove away, and D.H. ran behind a parked car because he feared being shot or run over. D.H. applied pressure to the victim's gunshot wound using his t-shirt and tried to keep the victim awake, according to the instructions from the 9-1-1 operator. The victim again revealed that his brother shot him, and D.H. tried to reassure the victim that he would survive. N.H. testified that as he held the victim's hand, the victim stated, "Oh, my God, I'm

going to die, I'm going to die." The paramedics then arrived and took the victim to the hospital, where he did in fact die.

¶15 Based on this evidence, the trial court could easily conclude that the statement fit within the dying declaration exception. The victim, within minutes after making the "stupid shit" statement, said that he was going to die. His belief was reasonable as he was bleeding profusely and enduring severe pain. The statement also falls squarely within the excited utterance exception, as it was made by the victim just moments after he was shot. Thus, we find that the trial court did not abuse its discretion in denying Carlson's motion *in limine*.[3]

B. Presentence Incarceration Credit

¶16 Carlson argues that the trial court failed to give him full credit for his presentence incarceration. A trial court's failure to grant full credit for presentence incarceration

[3] We also reject Carlson's argument that the trial court erred in failing to *sua sponte* give a limiting instruction regarding the victim's statement. Carlson did not request such an instruction at trial and has therefore waived his argument on appeal. *See State v. Mott*, 187 Ariz. 536, 546, 931 P.2d 1046, 1056 (1997) (concluding defendant waived for review any claim that the trial court should have provided a limiting instruction on evidence of prior bad acts because the defendant did not request a limiting instruction and failed to object to the state's proffered instruction); *see also State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996) (finding that when a defendant does not request a limiting instruction on other bad acts, "the trial court's failure to *sua sponte* give a limiting instruction is not fundamental error").

constitutes fundamental error. *See State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989) (finding that the sentencing process must satisfy the requirements of due process).

¶17 Carlson was granted 362 days of presentence incarceration credit. He was arrested and taken into custody on August 18, 2007, and sentenced on August 15, 2008. The State concedes that the Carlson should have received 363 days of presentence incarceration credit. We may correct errors in awarding presentence incarceration credit on appeal. A.R.S. § 13-4037 (2010). Therefore, we modify Carlson's sentence to reflect one more day of presentence incarceration credit.

CONCLUSION

¶18 For the foregoing reasons, we affirm Carlson's conviction for manslaughter and the related sentence imposed, except as modified herein.

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
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PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge